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91-2020

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

BENTON BRETT SAYLORS,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

Petition for a Writ of Certiorari to the Court of Appeals for the Eleventh District of the State of Texas

---

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QUESTIONS PRESENTED FOR REVIEW

Whether a criminal defendant in a state court, faced with the possibility of imprisonment, is presumptively deprived of due process (including effective assistance of counsel), in violation of the Fourteenth Amendment, when tried before a judge who has not been required to demonstrate or prove the degree of his or her legal competence by any uniform, standardized testing procedure.

Whether the current county court system in Texas invidiously denies one class of criminal defendants a substantial benefit available to another, similarly situated, class, in violation of the equal protection clause of the Fourteenth Amendment.

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Benton Brett Saylors petitions for a writ of certiorari to review the judgment, in part, of the Court of Appeals for the Eleventh District of the State of Texas.

REPORTS OF PRIOR OPINIONS

The Texas Court of Appeals ordered that its opinion not be published.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered on January 9, 1992. A petition for discretionary review of same by the Texas Court of Criminal Appeals was denied by order dated April 15, 1992. The Texas Court of Appeals declared art. V, §15 of the Texas Constitution to be valid and not repugnant to the Fourteenth Amendment to the United States Constitution. Jurisdiction for review by this Court is therefore conferred by 28 U.S.C. §1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved provide in pertinent part:

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right...to have Assistance of Counsel for his defense.

Fourteenth Amendment

No State shall...deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

The provision of the Texas Constitution involved provides in pertinent part:

Article V, Section 15

There shall...be elected in each county, by the qualified voters, a County Judge, who shall be well informed in the law of the State...

STATEMENT

Petitioner was adjudged guilty by a jury of being intoxicated while of driving a motor vehicle in a public place, an offense punishable by incarceration and fine. Upon appeal, the Texas Court of Appeals (Eleventh District) reversed the conviction and ordered the case remanded on a matter of state procedure. It also ruled, however, that Petitioner had not been (and would not again be) deprived of his right under the Sixth and Fourteenth Amendments to effective assistance of counsel, equal protection of the laws, and due process of law, even though the judge presiding over his trial was not licensed as an attorney or subject to any testing procedures designed to assure any particular degree of legal competence (other than review of performance during actual trials). This question, by its nature, could not be raised in the court of first instance, but was timely and properly raised by point of error, with supporting argument and authorities, in Petitioner's brief before the Court of Appeals.

As provided since 1876 under art. V, § 15 of its Constitution, Texas' elected County Judges need not be

licensed to practice law so long as they are "well informed in the law." The qualifications of candidates to hold the office, in this regard, are supposedly determined by virtue of their success at the polls. *Little v. State*, 75 Tex. 616, 12 S.W. 965 (1890); *Ex parte Craig*, 150 Tex.Cr.R. 598, 193 S.W.2d 178, 185 (1946), *rev'd on other grounds*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947). Even so, specialized instruction of sitting county judges is mandated. The state's educational program, however, includes no testing of the participants' skills or retention of knowledge and there is no requirement that any particular number of hours be devoted to the study of criminal law or procedure.

The trial judge in this case had received no formal legal training aside from that provided in accordance with orders of the Texas Supreme Court under §74.025 of the Texas Government Code, a copy of which appears in Appendix B. His only direct experience with the criminal justice system had come during his tenure as Erath County Judge, since 1987. He had presided over eight jury trials before Mr. Saylor's, and one other criminal case in which the accused entered a plea of not guilty. Prior to his election as County Judge, he served as the principal of the Stephenville High School for 16 years. He received a bachelors degree in science from Texas A & M University in 1951 and a Masters of Education degree in Administrative Education from Texas A & M in 1967. He is certified to teach eleven subject areas in the secondary schools of Texas.

REASONS FOR ALLOWANCE OF THE WRIT

Denial of Due Process

The decisions of the Texas Court of Criminal Appeals in *Ex parte Ross*, 522 S.W.2d 214, 219-20 (Tex.Cr.App.), *cert. denied*, 423 U.S. 1018, 96 S.Ct. 454, 46 L.Ed.2d 390 (1975) and *Masquelette v. State*, 579 S.W.2d 478, 479-80 (Tex.Cr.App.), *appeal dism'd and cert. denied*, 444 U.S. 986, 100 S.Ct. 515, 62 L.Ed.2d 416 (1979), cited by the court below as controlling its decision, conflict with the decision and reasoning of the California Supreme Court in *Gordon v. Justice Court of Sutter County*, 12 Cal.3d 323, 115 Cal.Rptr. 632, 525 P.2d 72 (1974), *cert. denied*, 420 U.S. 938, 95 S.Ct. 1148, 43 L.Ed.2d 415 (1975) concerning this important matter of federal law. Because this issue can be finally resolved only by this Court, and is squarely presented in a simple case with an exceptionally concise record, the opportunity to settle the question should not be passed by.

For the reasons explained by Justice Stewart in his dissenting opinion in *North v. Russell*, 427 U.S. 328, 96 S.Ct. 2709, 2716 49 L.Ed.2d 534 (1976), trial before a lay judge engenders a high probability that a criminal defendant will receive only "a teasing illusion" of assistance from his attorney, or a fair trial. The essential presupposition of the right to assistance of counsel "is that the judge conducting the trial will be able to understand what the defendant's lawyer is talking about." This is what led the Supreme Court of Tennessee to say 12 years ago: "We [now] consider it beyond dispute that the dictates of fundamental fairness, the demands of common

sense and the developing law of this modern era require that the state supply a law-trained judge in all of our criminal courts of record..." *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 788 (Tenn. 1980).

Potential deprivation of due process still clearly exists if a defendant's attorney has no one capable of effectively judging the merits of his arguments or tactics. Also, this problem cannot be any more acceptably solved through case by case review of the individual outcomes than was attempted under *Betts v. Brady* with respect to the provision of counsel to those unable to retain their own attorney. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963).

It simply makes no sense that a state should require the representative of the accused to possess far greater qualifications in the science of law than the person who controls the results of his efforts. No court has ever denied that a judge must have reasonable command of legal principles in order to deal with or assess the advocacy of each side of the dispute. Indeed, a requirement that a trial judge be a licensed attorney has been justified as meeting a "compelling need" to have judges qualified to deal with legal complexities. *Torjesen v. Smith*, 114 Ill.App.3d 147, 150, 448 N.E.2d 273, 275 (1983). See also *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1292 (5th Cir.), *cert. denied*, 419 U.S. 1006, 95 S.Ct. 687, 42 L.Ed.2d 688 (1974) (stating that a judge must be equipped to follow the law). Over the years the Texas legislature has come to recognize the desireability (if not necessity) of having a judge with greater legal training to decide the issues determined in its County

Courts. See § 51.18, Texas Family Code; § 5 (b), Texas Probate Code; §§ 26.111, 26.112, Texas Government Code.

Common sense and experience dictate that evaluative procedures apart from the mere ability to get elected must be established in order to gauge with any certainty or predictability the actual abilities of judges in courts with jurisdiction over criminal offenses punishable by substantial fines and imprisonment. The accelerating growth in the number of statutes regulating every imaginable "profession" demonstrates beyond reproof that competency in even rather uncomplicated fields is no longer reliably ascertained or accepted except through the process of becoming a licensed practitioner. Someone who has not demonstrated ability in this or possibly some other similar manner cannot and therefore should not be assumed to be qualified for service, no matter how honorable or well-meaning.

In *Ex parte Ross, supra*, in analyzing the relationship or proper "equation" between legal training and judicial competence, the court conveniently ignored the attributes which are validly presumed to accompany one licensed as an attorney. See *Hankamer v. Templin*, 143 Tex. 572, 187 S.W.2d 549, 551 (1945). It chose instead to mold the role of a judge to match the qualities of a non-lawyer, and then apparently went on to assume that the Texas Constitution reasonably assures its county judges are persons "interested, competent, and dedicated to the work of [their] courts."

Petitioner has no quarrel with the idea that a good judge will seek to choose fairly and impartially between two

espoused viewpoints. Neither does he doubt that wisdom and common sense are equally as important as legal education in this regard. Nevertheless, he must question why due process does not also demand some real safeguard that the arbiter will be capable of correctly administering the substantive law and governing rules of evidence and procedure.

To correctly interpret the Constitution, this Court need only recall what it stated when the law was far less complex than it is today: "[e]ven the intelligent and educated layman has small...skill in the science of law." *Powell v. Alabama*, 287 U.S. 45, 68, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932).

Denial of Equal Protection

The rational basis for the unequal treatment provided to defendants in Kentucky under the facts examined by this Court in *North v. Russell, supra*, does not exist here. The Texas county court scheme is not tailored to meet differences in county population or caseload or availability of lawyers or financial resources. Certainly, more remote counties with lesser populations than Erath County have or have had licensed attorneys as their county judges. In recent years about one-fourth of Texas county judges have consistently been attorneys, without any apparent correlation to the factors mentioned.

In addition, precisely because Texas does not have any true minimum qualification standards, as carefully pointed out by the New Mexico Supreme Court in footnote 6 of its opinion, cases such as *Tsiosdia v. Rainaldi*, 89 N.M. 70,

547 P.2d 553 (1976) are also distinguishable. If the Equal Protection Clause truly means that all persons subjected to state legislation must (without some compelling reason) be treated alike, then the system adopted in Texas fails to conform. "Equal protection of the laws is not achieved through indiscriminate imposition of [increasingly significant] inequalities." *Sweatt v. Painter*, 339 U.S. 629, 635, 70 S.Ct. 848, 850-1, 95 L.Ed.2d 620 (1950).

CONCLUSION

Because of the confusion caused by the majority's failure to deny outright the assertions made by Justices Stewart and Marshall in *North v. Russell, supra*, a writ of certiorari should be granted.

Respectfully submitted,

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Certificate of Service

I, Martin L. Peterson, a member of the Bar of the United States Supreme Court, appearing herein as counsel for the Petitioner, hereby certify that this 5th day of ~~May~~ June, 1992, three copies of the above and foregoing Petition for Writ of Certiorari were served on all parties required to be served, by depositing same in the United States mail, postage prepaid. The names, addresses, and telephone numbers of counsel are: Phil Nichols, Erath County Attorney, Erath County Courthouse, Stephenville, Texas 76401, (817) 965-1453, representing the State of Texas, and Dan Morales, Attorney General of Texas, P. 0. Box 12548, Austin, Texas 78711, (512) 463-2100, who is served in accordance with Rule 29.4 (c) of this Court because 28 U.S.C. § 2403 (b) may be applicable.

Martin L Peterson

Martin L. Peterson

APPENDIX A

11th Court of Appeals

Eastland, Texas

Opinion

Benton Brett Saylors,

Appellant

vs. No. 11-91-128-CR
Appeal from Erath County

State of Texas,

Appellee

The jury convicted Benton Brett Saylors of driving while intoxicated,[1] and the county judge assessed his punishment at 180 days confinement (probated for 2 years) and a fine of $1,200.[2] We reverse and remand.

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[1] TEX.REV.CIV.STAT.ANN. art. 6701*l*-1(b) (Vernon Supp. 1992) defines the offense.

[2] TEX.REV.CIV.STAT.ANN. art. 6701*l*(d) [sic] (Vernon Supp. 1992) provides that when a person has one prior DWI conviction the punishment shall be a fine of not less than $300 nor more than $2,000 and confinement in jail for not less than 15 days nor more than two years.

Points of Error

Appellant asserts in two points of error that: (1) the trial court erred in permitting the information to be amended to charge him with a different offense over his objection; and (2) appellant was deprived of effective assistance of counsel, equal protection of the laws, and due process of law because the judge presiding over his trial was not a licensed attorney.

Amended Information

The complaint charging appellant with second-offense DWI was filed on July 31, 1990. The information which was filed that same day charged appellant with driving "without a policy of automobile liability insurance."[3] Without notice to appellant or his retained attorney and without a motion for leave of court, the county attorney filed an amended information on November 28, 1990, to charge appellant with second-offense DWI.

At trial on January 31, 1991, appellant's counsel objected when the amended information was read as the charging instrument. He argued that the amendment was made without leave of court and was otherwise improper under TEX. CODE CRIM. PRO. ANN. art. 28.10(c)

[3] TEX.REV.CIV.STAT.ANN. art. 6701h (Vernon Supp. 1992) defines this offense.

(Vernon 1989) because the amended information charged appellant with a different offense (DWI) than that alleged in the original information which had been filed in the case (driving without proof of insurance).[4] The court overruled the objection. This was error. See *Flowers v. State*, 815 S.W.2d 724 at 728 (Tex.Cr.App.1991) (a "different offense" means a "different statutory offense.") The Court of Criminal Appeals has held that this type of error is not subject to the "harmless error" analysis of TEX.R.APP.P. 81(b)(2). See *Sodipo v. State*, 815 S.W.2d 551 at 554 (Tex.Cr.App.1990). The first point of error is sustained.

Qualifications of County Judge

In his second point of error, appellant urges that his rights were violated because the county judge was not a licensed attorney. The Texas Constitution requires county judges to "be well informed in the law of the State, " but it does not require them to be licensed attorneys. See TEX. CONST. art V, § 15. This does not violate appellant's rights to the effective assistance of counsel, equal protection of the laws, due process, or due course of law. See *Masquelette v. State*, 579 S.W.2d 478 at 479

[4] Article 28.10(c) provides:

> An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced. (Emphasis added)

(Tex.Cr.App.), *cert. den'd*, 444 U.S. 986, 100 S.Ct. 515, 62 L.Ed.2d 416 (1979) ; *Ex parte Ross*, 522 S.W.2d 214 at 219 (Tex.Cr.App.), *cert. den'd*, 423 U.S. 1018, 96 S.Ct. 454, 46 L.Ed.2d. 390 (1975). Appellant's second point of error is overruled.

The judgment of the trial court is reversed, and the cause is remanded.

BOB DICKENSON

JUSTICE

January 9, 1992
Do not publish. See TEX.R.APP.P. 90.

APPENDIX B

SUPREME COURT OF TEXAS

JUDICIAL EDUCATION EXECUTIVE COMMITEE

Justice Eugene A. Cook, Chairman

RULES OF JUDICIAL EDUCATION

As Amended Through June 20,1990

RULE 1. AUTHORITY. Pursuant to the inherent and constitutional authority of the Supreme Court to administer the judicial affairs of the state and to the provisions of Section 74.024 and 74.025 of the Texas Government Code, these Rules of Judicial Education are hereby promulgated.

RULE 2. APPELLATE, DISTRICT AND COUNTY-LEVEL COURT JUDGES.

a. Each judge of an appellate court, district court, statutory county court, and county court performing judicial functions will, as an official duty:

(1) complete before taking office, or within one year after taking office, at least 30 hours of instruction in the administrative duties of office and substantive, procedural and evidentiary laws unless the judge has previously complied with this requirement

and has been absent from the bench less than one year before taking the present office, and

(2) each calendar year thereafter, complete at least 16 hours of instruction in substantive, procedural and evidentiary laws and court administration.

(3) Instruction credit completed during any calendar year in excess of the minimum number of hours required may be applied to the following year's requirement. This carry-over provision applies to one year only.

b. Any program sponsored by the following organizations or otherwise approved by the Supreme Court Education Committee, can be utilized to satisfy the requirements of Rule 2.a.:

(1) Judicial Section of the State Bar of Texas
(2) Texas Center for the Judiciary, Inc.
(3) National Judicial College, Reno, Nevada
(4) Appellate Judges' Conference of the American Bar Association, Chicago, Illinois
(5) American Academy of Judicial Education, Washington, D.C.
(6) Institute of Judicial Administration, N.Y.U., New York, N.Y.
(7) Texas College of Probate Judges
(8) National College of Probate Judges
(9) An accredited law school

(10) A local, state or national bar association

(11) A professional organization devoted to improvement of the legal profession (such as the Texas Association of Defense Counsel and the Texas Trial Lawyers Association)

(12) The Texas Association of Counties, the County Judges and Commissioners Association of Texas or the V. G. Young Institute of Texas A & M University.

* * *